1988

The State of Utah v. Robert Paul Pacheco : Brief of Respondent

Utah Court of Appeals

R. Paul Van Dam; Attorney General; Barbara Bearnson; Assistant Attorney General; Attorneys for Respondent.

James A. Valdez; Richard G. Uday; Salt Lake Legal Defender Assoc.; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :

Plaintiff-Respondent, : Case No. 880281-CA

v. :

ROBERT PAUL PACHECO, : Category No. 2

Defendant-Apellant. :

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION OF BURGLARY, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-202 (1978), IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE DAVID S. YOUNG, JUDGE, PRESIDING.

R. PAUL VAN DAM
Attorney General
BARBARA BEARNSON
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

JAMES A. VALDEZ
RICHARD G. UDAY
Salt Lake Legal Defender Assoc.
424 East 500 South
Salt Lake City, Utah 84111

Attorney for Appellant

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 880281-CA
v.	:	
ROBERT PAUL PACHECO,	:	Category No. 2
Defendant-Apellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION OF BURGLARY, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-202 (1978), IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE DAVID S. YOUNG, JUDGE, PRESIDING.

R. PAUL VAN DAM
Attorney General
BARBARA BEARNSON
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

JAMES A. VALDEZ
RICHARD G. UDAY
Salt Lake Legal Defender Assoc.
424 East 500 South
Salt Lake City, Utah 84111

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

STATUTES AND RULES

IN THE UTAH COURT OF APPEALS

STATE OF UTAH	:	
Plaintiff/Respondent,	:	Case No. 880281-CA
v.	:	
ROBERT PAUL PACHECO,	:	Priority 2
Defendant/Appellant.	:	

BRIEF OF RESPONDENT

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a conviction of burglary in violation of Utah Code Ann. § 76-6-202 (1978) and theft, a class B misdemeanor, in violation of Utah Code Ann. § 76-6-404 (1978), following a jury trial in Third District Court, in and for Salt Lake County, the Honorable David S. Young, Judge, presiding. This Court has jurisdiction of this appeal under Utah Code Ann. § 78-2a-3(2)(e) (1987) and Utah Code Ann. § 77-35-26(2)(a) (Supp. 1988).

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

1. Whether the pretrial identification procedures were so unduly suggestive that defendant's due process rights were violated and whether he was so prejudiced he is entitled to a new trial.

2. Whether the admission into evidence of a photo array prejudiced defendant by informing the jury that he has prior criminal convictions. Whether defendant properly preserved for appeal the issue of whether the trial court committed error

in determining that defendant could be impeached by introduction of a prior conviction.

3. Whether the evidence was sufficient to sustain defendant's convictions for burglary and theft.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Fifth Amendment, United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, United States Constitution (in part):

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 7, Constitution of Utah:

> Sec. 7. [Due Process of law.]
> No person shall be deprived of life, liberty or property, without due process of law.

Utah Code Ann. § 76-6-202 (1978):

> Burglary - (1) A person is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit a felony or theft or commit an assault on any person.
>
> (2) Burglary is a felony of the third degree unless it was committed in a dwelling, in which event it is a felony of the second degree.

Utah Code Ann. § 76-6-404 (1978):

> Theft - Elements - A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

Utah Code Ann. § 77-35-19(c) (1982):

> (c) No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury is instructed, stating distinctly the matter to which he objects and the ground of his objection. Notwithstanding a party's failure to object, error may be assigned to instructions in order to avoid manifest injustice.

Utah Code Ann. § 77-35-30(a) (1982):

> Any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded.

Utah R. of Evid. 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

> Although relevant, evidence may be excluded it is probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Utah R. of Evid. 609. Impeachment be evidence of conviction of crime.

> General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

STATEMENT OF THE CASE

Defendant, Robert Paul Pacheco, was charged with burglary, a second degree felony in violation of Utah Code Ann. § 76-6-202 (1978) and theft, a class B misdemeanor, in violation of Utah Code Ann. § 76-6-404 (1978). He was convicted as charged following a jury trial on March 24 and 25, 1988. He was sentenced to not less than one nor more than fifteen years in the Utah State Prison on the burglary conviction and to six months on the theft conviction; the sentences were ordered to run concurrently.

STATEMENT OF THE FACTS

On April 7, 1987, Katherine and Ray Welch were burglarized (T. 28). While they were working in their backyard, a man, later identified as the defendant, knocked on their front door (T. 17-18). The man went into the house and stole money from both Mr. and Mrs. Welches' wallets (T. 38). Mr. Welch discovered the man when he went to the house for a jacket (T. 36). The man fled from the house, ran across the lawn, jumped a fence, ran to his car parked nearby and sped away (T. 37).

On the day in question, Josephine Eward, who lives directly across the street from Mr. and Mrs. Welch, saw a white and blue Nova drive up and park near the Welches' home (T. 12-13). She saw a man get out of the car and approach the door (T. 14). She was aware that the Welches were in their backyard as the man knocked two or three times on the front door (T. 18). She only saw his back, but noted the shirt he was wearing and noticed that he was thin (T. 17). Defendant is 5'6" and weighs

130 pounds (T. 84). Mrs. Eward did not see defendant enter the house, but later saw the man suddenly run down the porch stairs and across the lawn, jump the fence, get into his car and quickly drive away (T. 18-19).

After working in the backyard, Mr. Welch went to the house for a jacket and saw someone in his kitchen (T. 36). The man ran through the dining room, into the hall and out the door to his blue and white car parked nearby (T. 37). Mr. Welch yelled at him, but the man continued on (T. 37). When he got to his car, he turned to look back (T. 37). Mr. Welch observed the man to be wearing a plaid shirt, but because he had not seen his face, was unable to identify him (T. 36-38)

Katherine Welch was working in the backyard mowing the lawn with her husband (T. 25). She heard her husband yell and ran to the fence as she saw a man go out of the house and run. She observed that he was slender, moved rapidly, and was wearing a red and white checkered shirt and beige or tan pants (T. 26). He ran to a blue and white car and drove away (T. 27).

Connie Luna, who lives "kitty-corner" to the Welches, got a good look at the man and was able to positively identify him (T. 61). Mrs. Luna was standing on her porch waiting for her husband to get home from work when she saw defendant at the Welches' house; at that time she only saw his back (T. 46). Later, she heard Ray Welch yell (T. 47). Because Mrs. Luna realized something was amiss, she ran across the yard to get a better look at defendant and yelled "hey you" (T. 47). Defendant ran to his car and drove off (T. 47). Mrs. Luna was within about

twenty feet of defendant and was able to look at him "full face" (T. 51-52). He was wearing a red checkered shirt which she described as tweed and beige pants (T. 51). Mrs. Luna was able to identify clothes introduced at trial as appearing to be the clothes defendant was wearing on the day he committed the crimes (T. 55, 67); the clothes had been seized defendant's home pursuant to a warrant (T. 80-81).

Mrs. Luna's eye-witness identification is corroborated by the fact that she was able to describe the car defendant was driving; the car was a blue and white car and she identified it in a photograph admitted at trial (T. 47-48). Not only was she able to identify the car based upon its appearance, she obtained the license number of the car before defendant sped away (T. 49). She could still remember the license number on the day of trial (T. 49). The car was, in fact, registered to defendant (T. 77).

Mrs. Luna was asked to look at a photo spread about a week after the incident; she was not able to positively identify the perpetrator, but identified defendant's photo as the person who "looked like" the man who committed the crime (T. 56-57). The photo spread contained black and white drivers license photos and the photo of defendant was not recent (T. 57, 64). About two weeks later, she was asked to examine a second photo-spread (T. 58). The second photo spread contained colored photos (T. 79). Because the second photo spread contained higher quality photos, she was able to conclusively identify defendant from the photo spread (T. 59, 71). The detective did not suggest to Mrs. Luna that she identify anyone in either photo spread (T. 71).

Mrs. Luna's identification of defendant was unequivocal. She was positive that the man she had seen on the day in question was defendant and identified him in court (T. 56, 61).

Defendant denied having committed the burglary and theft. He claimed to have lent his car to his son Troy (T. 116). He was unable to articulate why he remembered April 7 as the day when he had lent the car to his son (T. 119-121, 128). He had lent the car to his son a second time but was unable to identify with any specificity the second date on which he lent the car (T. 128).

Defendant's girlfriend stated that defendant had not seen his son Troy since 1986 because he and his son had had a fight (T. 104). Defendant, however, stated that on April 7 he loaned the car to Troy after Troy had contacted him and they "apologized" about their "fued" (T. 116). Because of this incident, defendant has not seen Troy since April 7 (T. 128).

Troy's stated purpose in borrowing the car was to go to Heber to get his children (T. 116). Defendant stated that Troy returned the car at about 5 p.m. (T. 121). Initially he stated that he had "no idea" whether Troy had the children with him when he returned (T. 126). He then testified that he had asked Troy about the children and Troy told him he had taken the children back to Heber City (T. 127).

Defendant was 42 years old at the time of trial; Troy was 22 (T. 113, 124). Troy is defendant's biological son (T. 124) and their is apparently some family resemblance (T. 111);

however, Mrs. Luna identified defendant, not Troy, as being the perpetrator (T. 56, 61).

Defendant was unemployed at the time of the burglary and theft (T. 123). At trial he presented medical records concerning an injury to his leg which he claimed caused him to be unable to run (T. 117-19). Defendant's medical records reflected that he had received treatment in 1984 and in November of 1987; defendant had not received medical treatment during the relevant time of April 1987 (126).

Defendant admitted he had made no effort to locate Troy prior to trial (T. 132). He also did not ask Troy's children or his mother, people Troy was allegedly with on April 7, about Troy's whereabouts on that day (T. 131).

Following presentation of the evidence, the jury deliberated and found defendant guilty as charged (T. 157).

SUMMARY OF THE ARGUMENT

The identification methods utilized by police authorities were not unduly suggestive, and did not deny defendant's constitutional right to due process. The police utilized two photo spreads. The first consisted of black and white photographs; the second consisted of color photographs which were more recent. An eye-witness, Connie Luna, identified defendant in the first photo spread as looking like the perpetrator. However, because of the quality of the photographs, she was unable to be positive. Consequently, the detective compiled a second photo spread with better quality photographs. Mrs. Luna positively chose defendant from the second group of

pictures. The techniques used by the detective were not unduly suggestive. Nevertheless, the eyewitness identification, under the totality of the circumstances was reliable. The admission of the evidence did not deny defendant due process of law.

The second photo spread was admitted at trial and bore photographs which contained the words "Salt Lake County Sheriff's Office." Whether these photographs were taken at the time of jail booking as the result of having committed a crime is outside the knowledge of an average juror. Regardless, the photographs did not link defendant with prior criminal activity. The photo spread had probative value and its admission did not inform the jury that defendant had a prior criminal record.

Defendant has waived the issue of whether he could be impeached by the use of prior convictions. The record does not contain a ruling on this issue. Additionally, defendant, not the prosecution, introduced this evidence during direct examination.

Connie Luna positively identified defendant as the person who had committed the burglary. The eye-witness identification and other corroborative evidence was sufficient to establish defendant's guilt beyond a reasonable doubt.

ARGUMENT

POINT I

THE IDENTIFICATION PROCEDURES UTILIZED BY THE POLICE IN THIS CASE DID NOT DENY DEFENDANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS.

Defendant contends that the identification procedures utilized by Detective LaMont in this case were unduly suggestive and violated due process rights guaranteed him by the fifth and

fourteenth amendments of the United States Constitution and by article I, section 7 of the Utah Constitution. He contends that the photo spreads utilized in this case were so suggestive that Connie Luna's identification of him at trial was unreliable and constitutes reversible error.

In the leading case of Simmons v. United States, 390 U.S. 377 (1968), the Supreme Court addressed the defendant's claim that the use of an unduly suggestive photo array prior to trial violated his right of due process. In an opinion by Justice Harlan, the Court acknowledged the possibility that showing photographs to witnesses might cause them to err in identifying criminal suspects. Id. at 384. Nevertheless, the Court recognized the validity of pretrial photographic identification, stating that "this procedure has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs." Id. The Court then set forth the constitutional standard by which photo identification procedures should be judged:

> We are unwilling to prohibit [the employment of photographic identification], either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement. Instead, we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on the ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. This standard accords

> with our resolution of a similar issue in Stovall v. Denno, and with decisions of other courts on the question of identification by photograph.

Id. (Emphasis added) (citations omitted).

The competing interests of efficient criminal investigation and fairness of process to the accused were similarly dealt with by the Supreme Court of Utah in State v. Perry, 27 Utah 2d 48, 492 P.2d 1349 (1972). While recognizing that "caution must be observed to see injustice does not result from the uses of methods which unfairly focus attention upon a particular suspect," the Court went on to state that "peace officers should not be unduly hampered in legitimate attempts to investigate crimes and to seek out and identify those who have committed them." Id. at 1352. If a claim of injustice in the identification procedures does arise, the Court posited that the:

> circumstances of the individual case should be scrutinized carefully by the trial court to see whether in the identification procedures there was anything done which should be regarded as so suggestive or persuasive that there is a reasonable likelihood that the identification was not a genuine product of the knowledge and recollection of the witness, but was something to distorted or tainted that in fairness and justness the guilt of innocence of an accused should not be allowed to be tested thereby.

Id. (Citations omitted.)

A due process claim will arise, according to the standard elucidated by the United States Supreme Court in Simmons and followed by the Utah Supreme Court in Perry, only if the identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

In Neil v. Biggers, 409 U.S. 188 (1972), the United States Supreme Court indicated that suggestiveness, alone, is not sufficient to suppress pre-trial identification. The Court set fourth five factors to be considered in determining whether under the "totality of the circumstances" the identification of a defendant was reliable even though the confrontation procedure was suggestive. First, the trial court must consider the opportunity of the witness to view the criminal at the time of the crime. Second, the court must consider the witness' degree of attention. Third, the court must consider the accuracy of the witness' prior description of the criminal. Fourth, the court must consider the level of certainty demonstrated by the witness. Finally, the court must consider the length of time between the crime and the identification by the witness.

These five factors have also been inferentially adopted by the Utah Supreme Court. See State v. Larocco, 665 P.2d 1272, 1273 (Utah 1983); State v. Newton, 657 P.2d 759 n.6 (Utah 1983); State v. Wulffenstein, 657 P.2d 289, 291-92 (Utah 1982), cert. denied, Wulffenstein v. Utah, 460 U.S. 1044 (1983). The factors are very similar to the test set forth by the court in State v. McCumber, 622 P.2d 353, 357 (Utah 1980), where the Court stated:

> Police identification procedures . . . do not deny theaccused due process of law unless, under a totality of the circumstances, they are so unnecessarily suggestive and conducive to irreparable mistaken identification as to deny the accused a fair trial. Where an identification procedure, even though suggestive, does not give rise to a substantial likelihood of misidentification, no due process violation has occurred. In determining the reliability of the

> identification under the totality of the circumstances, the court must also consider the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of any prior description of the criminal, the level of certainty demonstrated during the identification procedure, and the time between the crime and the identification.

(Footnotes omitted.)

In the present case, the State does not dispute defendant's contention that only one of four witnesses was in a position to enable them to identify defendant. However, one of those witnesses, Connie Luna, was in a position which enabled her to identify defendant and she was unequivocal in her identification.

First and foremost, the identification procedures utilized by Detective LaMont satisfied the threshold Biggers requirement and were not unduly suggestive. Less than a week after the crime, Mrs. Luna was asked by Detective LaMont to look at a photo spread (T. 56). The first photo spread contained black and white photographs which were not recent (T. 56). Mrs. Luna looked at the photos and tentatively identified the perpetrator and stated that he "looked like the guy but [she] wasn't sure" (T. 57). A week or two later (T. 58), Detective LaMont asked her to look at a second photo spread; Mrs. Luna identified defendant (T. 58). Mrs. Luna also identified defendant at trial (T. 56). She was "positive" in her identification of defendant as the burglar; she explained that she was sure "'cause that's the guy I saw when I hollered hey you when I heard Mr. Ray Welch holler at him and he come across the

street. I was standing right on the edge of the porch and I jumped off my porch and ran to the back of the yard where my driveway is and that's where he was parked with the license plate number. So I seen him in full view of his face" (T. 61) (emphasis added).

Even if this Court were to find the identification procedure utilized by the detective to be suggestive, when examining the five factors outlined by the United States Supreme Court in Biggers (which need be considered only if the procedure was suggestive), it becomes clear that Mrs. Luna's identification was reliable.

First, Mrs. Luna had an adequate opportunity to observe defendant at the time he committed the crime. Mrs. Welch was standing outside on her porch waiting for her husband to get home (T. 46). Defendant first drew her attention when he was running from the Welches' home (T. 46). Although initially she saw him only from the back, she had an opportunity as he was running to observe his size and build and the clothes he was wearing. Her attention was focused entirely on defendant. Because she heard Mr. Welch yell, she knew something was wrong (T. 47). She ran across the yard to get a better look at defendant and yelled "hey you" as defendant was running toward his car (T. 47); at one point defendant looked at her (T. 47). When defendant got to his car, he paused briefly and turned around (T. 37). Mrs. Luna saw defendant "full face" from a distance of about twenty feet (T. 51-52). Because she knew there was a problem, she took great care to observe as much detail as possible. She got a good look

at the car and obtained the license plate number (T. 47-49). As a result of her attention to detail, Mrs. Luna was still able to remember the license plate number almost a year later when the case went to trial (T. 49). Consequently, the first and second requirements of the Biggers test were satisfied; Mrs. Luna had an adequate opportunity to observe defendant and gave the matter a significant degree of attention.

Additionally, Mrs. Luna's prior description of defendant was accurate. She observed the clothing defendant was wearing and described his shirt as being a "red checked shirt that looked like tweed material and beige colored pants" (T. 51). She identified clothing at trial that had been seized from defendant's house pursuant to a search warrant (T. 55, 67). Mrs. Luna did not describe defendant as being twenty five, as defendant contends (AB 14); Mrs. Luna did not venture a guess as to defendant's age (T. 69). While obviously it would have been helpful if she were able to accurately state his age, she was not "inaccurate" in her prior description.

The fourth factor of the Biggers test was also satisfied. Mrs. Luna demonstrated a marked level of certainty in her identification of defendant. Not only was she "positive," she was able to articulate why she was positive (T. 56-61). She has a rather remarkable memory as demonstrated by her ability to recall the license plate number of the car at trial (T. 49).

Finally, while the time between Mrs. Luna's observation of defendant and her identification of him in the second photo spread was not ideal, the length of time was not so long as to

render the identification unreliable. Mrs. Luna was unsure of the dates on which she was shown the photo spreads. She stated that the first was about a week after the incident, and the second was about two weeks after that (T. 56-58). Detective LaMont stated that he asked her to look at the second photo spread during the first of May (T. 76). Consequently, about a month had lapsed between her observations of defendant and her definite identification of him. A one month period of time is not necessarily suspect. In fact, in Neil v. Biggers, 409 U.S. 188, 201 (1972), a case in which the Supreme Court upheld the admissibility of the eyewitness' identification, a seven month period of time had lapsed between the crime and the witness' identification of the perpetrator.

Defendant also contends that the fact that his was the only photo repeated in the second photo spread rendered the process unduly suggestive. However, this fact alone is insufficient to justify such a finding. State v. Alvarez, 145 Ariz. 370, 701 P.2d 1178 (1985).

When examining the totality of the circumstances, the identification procedures were not unduly suggestive. Regardless, when examining the Biggers factors, it is clear that Mrs. Luna's identification of defendant was reliable. There was not a substantial likelihood of misidentification. State v. McCumber, 622 P.2d 353 (Utah 1980). Defendant's due process rights guaranteed by the fifth and fourteenth amendments to the United States Constitution and article 1, section 7 of the Utah Constitution were not violated, and he is not entitled to a new trial.

POINT II

EVIDENCE RELATED TO DEFENDANT'S PRIOR CRIMES WAS NOT IMPROPERLY PRESENTED TO THE JURY.

A. The trial court did not commit reversible error in admitting into evidence a photo spread from which an eye witness identified defendant.

Defendant contends that the trial court committed prejudicial error in admitting into evidence a second photo spread from which an eyewitness, Connie Luna, made a positive identification of defendant. Defendant claims that introduction of the photo spread violated his due process rights because of an alleged imputation of prior criminal activity in the presentation and nature of the photographs.

The trial court correctly ruled that the photo spread was not prejudicial in nature and that it would be beyond the understanding of the jurors that the photographs were taken as the result of a previous criminal episode of the defendant. Though the placard in front of the pictures said "Salt Lake County Sheriff," the phrase was not sufficient to plant in the minds of the jurors the idea that the pictures were taken in the course of a previous arrest. Aside from the placard designation, the pictures had none of the characteristics which a juror would associate with an arrest photograph. The pictures show no dates or numbers and contain only a full frontal view of the men, not the typical front and side view a person might associate with an arrest photograph. A juror looking at the photo spread could assume that the pictures were taken by the sheriff's office purely for identification purposes.

In United States v. Harrington, 490 F.2d 487, 491 (2d Cir. 1973), the court approved the admission into evidence a photo spread containing mugshot photos which had the numbers on the front excised, and stated:

> [W]e felt that the jury may well have inferred, if their suspicions were aroused as all, that these were photographs taken at the time the defendants were arrested on the charges for which they were then being tried and were not indicative of earlier contacts with the law.

The court in Harrington also looked favorably on the fact that the judge did not allude to anything during the introduction of the pictures that might have aroused any suspicions in the minds of the jury. Likewise, in the present case, there was no mention by the trial court of anything that may have aroused the jury's suspicions regarding prior criminal episodes by defendant.

Courts have struggled with the problem of using mugshot photographs in the investigatory stages of the criminal process. While recognizing that there must be limitations on the admissibility of evidence which may imply prior criminal behavior on the part of the defendant, courts understand the necessity of the use of such photographs in investigatory procedures. Simmons v. United States, 390 U.S. 377 (1968). Whether to admit such photographs during the course of a trial is an evidentiary determination to be made by the trial court. State v. McClain, 706 P.2d 603 (Utah 1985).

In the instant case, the issue before the jury was one of the identification of defendant by an eyewitness. The

photographs from which the witness identified defendant are relevant evidence. Relevant evidence is generally admissible. Utah R. Evid. 402. In making the determination of relevance, the trial court must determine the probative value when juxtaposed to the prejudicial effect. Utah R. Evid. 403. Given the nature of the photographs and the issues at trial, the probative value outweighed any potential undue prejudice.

In State v. Owens, 15 Utah 2d 123 , 388 P.2d 797 (1964), the Utah Supreme Court upheld the admissibility of a photo spread containing "mugshots." In Owens, a store manager identified the defendant as the individual for whom he had cashed a forged money order. The identification took place two or three days after the crime and was accomplished through the use of a photo spread containing mugshots. The Court found the admission of the photo spread into evidence was relevant to the issue of identification.

Defendant relies on United States v. Harrington, 490 F.2d 487 (2d Cir. 1973) in support of his argument that the photo spread should not have been admitted. In Harrington, the court formulated a three-prong test to determine the admissibility of mugshots into evidence. First, the government must have a demonstrable need to introduce the photographs; second, the photographs themselves, if shown to the jury, must not imply that the defendant has a prior criminal record; and third, the manner of introduction at trial must be such that it does not draw particular attention to the source of implications of the photographs. Id. at 495.

The Utah courts have not adopted the Harrington standard and are, therefore, not bound to follow it. However, when applying the factors, the photo spread was admissible. First, the state had a demonstrable need to introduce the photo spread. In the instant case, defendant claimed that he was misidentified by the eyewitness. In addition, defendant brought into question the identification procedure utilized by the police. Mrs. Luna was asked questions about the second photo spread; specifically, whether any of the other men in the photo spread looked like defendant (T. 66). By asking questions concerning the content of the photo spread and implying its impropriety, the relevance of the photo spread became even greater, further justifying its admission into evidence. Even if the use of "mugshots" were found to suggest prior criminal activity, they were nonetheless admissible on the issue of defendant's identification and the manner in which the identification was made. People v. Robinson, 467 N.E.2d 291 (Ill. App. 1984).

Secondly, the photo spread itself did not inform the jury that defendant had a prior criminal record. The trial court did not find anything in the photo spread itself that would imply a prior criminal record (T. 93-94). The jurors may have well inferred, if, indeed, they had suspicions, that the photographs were taken for identification procedures only, and were not associated with prior convictions. The average juror does not have such a sophisticated understanding of police procedures in order to take the quantum leap from an observation of the photo spread to the knowledge that defendant was a convicted felon.

Finally, the introduction of the photo spread did not draw undue attention to the source or nature of the photographs. Based on the Harrington standard, it is evident that the trial court did not abuse its discretion in admitting the photo spread. Nothing was done on the part of the trial court or the prosecution to suggest that the photographs linked defendant to prior criminal activity.

As set-forth below, defendant--not the prosecution--informed the jury that he was a convicted felon (T. 115). Consequently, even if this Court were to find that the photo spread impermissibly linked defendant with prior criminal activity, it is clear that the error was harmless. "Any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded." Utah R. Crim. P. 30 (1).

It is well-settled that an appellate court will not interfere with the trial court's ruling on evidentiary matters absent a showing "that the court so abused its discretion that there is a likelihood that injustice resulted." State v. McClain, 706 P.2d 603, 604 (Utah 1985). See also State v. McCardell, 652 P.2d 942, 944 (Utah 1982); State v. Danker, 599 P.2d 518, 520 (Utah 1979). In the present case, there was not an abuse of discretion and no injustice resulted; consequently, this Court should affirm the ruling of the trial court on this issue.

B. Defendant has failed to preserve the issue of whether evidence of his prior criminal convictions was admissible under Utah R. Evid. 609.

Defendant filed a motion in limine in which he asked the trial court to rule that the prosecution be precluded from impeaching him pursuant to Utah R. Evid. 609 by use of his prior criminal convictions (R. 37). Defendant failed to obtain a ruling on the record on this issue.

Consequently, defendant has failed to preserve this issue for appeal. It is incumbent on a moving party to obtain a ruling from a trial court on the substance of a motion in limine. Failure to obtain a ruling on the record as the result of oversight, abandonment of the issue, or otherwise, precludes the movant from raising the issue on appeal. Feldstein v. People, 159 Colo. 107, 410 P.2d 188 (1966); State v. Knight, 78 N.M. 482, 432 P.2d 838 (1967); Fixico v. State, 735 P.2d 580 (Okla. Cr. 1987); Nealy v. State, 636 P.2d 378 (Okla. Cr. 1981). The Utah Supreme Court has stated that it will not rule on matters outside of the record. State v. Bingham, 684 P.2d 43 (Utah 1984); State v. Sparks, 672 P.2d 92 (Utah 1983), (disavowed on other grounds, State v. Ossana, 739 P.2d 628 (Utah 1987).

The record in this case contains defendant's motion in limine (R. 37). The next reference to prior convictions for Rule 609 impeachment purposes was made by defendant in his own direct testimony (T. 115). The record contains no ruling from the trial court. Consequently, it is impossible for this Court to review the trial court's determination, if indeed one was made, and this court should not consider the merits of the issue.

POINT III

THE EVIDENCE WAS SUFFICIENT TO ESTABLISH DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT OF BURGLARY AND THEFT.

Defendant claims that the evidence was insufficient to convict him of burglary and theft. The Utah Supreme Court pointed out in State v. Booker, 709 P.2d 342 (Utah 1985), that when a defendant claims the evidence was insufficient to sustain his conviction, an appellate court should limit the scope of its review.

> "[W]e review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury. We reverse a jury conviction for insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." State v. Petree, Utah, 659 P.2d 443, 444 (1983); accord State v. McCardell, Utah, 652 P.2d 942, 945 (1982). In reviewing the conviction, we do not substitute our judgment for that of the jury. "It is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses . . . ." State v. Lamm, Utah, 606 P.2d 229, 231 (1980); accord State v. Linden, Utah, 657 P.2d 1364, 1366 (1983). So long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonable be made, our inquiry stops.

Id. at 345. This Court has also succinctly stated that unless there is a clear showing by the appellant of lack of evidence, the jury verdict will be upheld. State v. Gabaldon, 735 P.2d 410, 412 (Utah App. 1987); State v. One 1982 Silver Honda Motorcycle, 735 P.2d 392, 393-94 (Utah App. 1987).

A person commits burglary "if he enters or remains unlawfully in a building . . . with intent to commit a felony or theft or commit an assault on any person." If the burglary takes place in a dwelling, it is a second degree felony. Utah Code Ann. § 76-6-202 (1978). A person commits theft "if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof." Utah Code Ann. § 76-6-404 (1978). If the property stolen is valued at $100 or less, the crime is a class B misdemeanor. Utah Code Ann. § 76-6-412 (1)(d). The evidence in this case is sufficient to establish defendant's guilt beyond a reasonable doubt on each crime.

Ray and Katherine Welch were in their backyard doing yardwork when the burglary occurred (T. 17-18). A man matching defendant's description was seen by a neighbor on the Welches' porch (T. 14). Defendant unlawfully entered their home and was surprised by Mr. Welch when he came into the house to get a jacket (T. 36-37). Mr. Welch only saw defendant from behind, but followed him out of the house and yelled at him (T. 37). Mrs. Welch, hearing her husband yell, came out of the backyard and saw defendant run out of their front door (T. 25-26). Another neighbor, Connie Luna, heard Mr. Welch yell and ran down to the sidewalk (T. 47). She yelled at defendant and he turned and looked at her (T. 47) when he was about twenty feet away (T. 51). Mrs. Luna was able to see defendant "full face" and was able to later identify him (T. 51-52).

All four witnesses observed the man get into a blue and white car and drive away (T. 13, 27, 37, 49). Mrs. Luna

identified the car as a Nova and also got the license number of the car (T. 49). The car was registered to defendant (T. 77). After the incident took place, Mr. Welch discovered that somewhere between $4 and $50 had been taken from his and his wife's wallets (T. 38-39).

Mrs. Luna has a remarkable memory. Even though the trial took place almost a year after the burglary, she was able to recall and relate the license plate number (T. 49). Mrs. Luna positively identified defendant from a photo spread (T. 55), at the preliminary hearing (T. 56), and at trial (T. 56). Mrs. Luna was positive in her identification and did not equivocate.

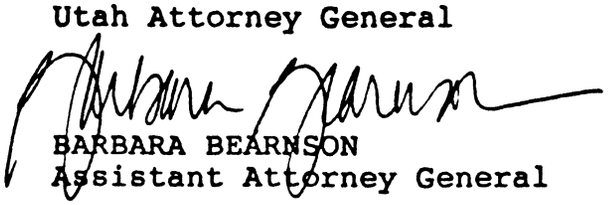
The evidence supports the jury's conclusion that defendant committed the burglary and theft. The evidence was not so insubstantial or lacking that a reasonable person could not have reached a guilty verdict beyond a reasonable doubt. Gabaldon, 735 P.2d at 412. Therefore, defendant's convictions should be affirmed.

CONCLUSION

The defendant, Robert Paul Pacheco, was properly convicted of burglary and theft. For the foregoing reasons, and any additional reasons advanced at oral argument, the State of Utah respectfully requests that this Court affirm defendant's conviction.

RESPECTFULLY submitted this 17th day of February, 1989.

R. PAUL VAN DAM
Utah Attorney General



BARBARA BEARNSON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to James A. Valdez and Richard G. Uday, Salt Lake Legal Defender Association, 424 East 500 South, Salt Lake City, Utah 84111, on this 17th day of February, 1989.